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# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 183

HOLLOWAY GRAVEL COMPANY, INC., PETITIONER

*v.*

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court (R. 33–35) is not officially reported. The opinion of the United States Court of Appeals (R. 42–43) is reported at 174 F. 2d 421.

### JURISDICTION

The judgment of the court below was entered on May 19, 1949 (R. 44). A petition for rehearing was denied on June 10, 1949 (R. 51). The petition for certiorari was filed on July 11, 1949.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether the district court had power to order compliance with a subpoena duces tecum issued by the Administrator of the Wage and Hour Division, without a prior determination that petitioner is subject to the Fair Labor Standards Act.

## STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, and Section 9 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

## STATEMENT

After petitioner's repeated refusal to permit inspectors of the Wage and Hour Division to examine its wage and hour records for the purpose of determining whether it was violating the Fair Labor Standards Act (R. 4, 9–10, 17, 25, 43), petitioner's president was served with a subpoena duces tecum signed by the Administrator of the Division (R. 4–5, 12). Petitioner had made available and the inspector had examined the records relating to the nature of its business and the distribution of its products, but had refused to permit examination of its payroll and time cards on the ground that it was engaged in an intrastate

business outside the scope of the Act (R. 9, 18, 43). The subpoena called for the production of petitioner's records showing wages paid to and hours worked by the employees for the period from October 27, 1945, to the date of the subpoena (R. 12–13).

Following petitioner's refusal to comply with the subpoena (R. 5–6, 11, 17), the Administrator on July 12, 1948 applied to the district court for an enforcement order (R. 2–7). The application alleged, on information and belief, that respondent was engaged "in the production of sand and gravel for interstate commerce, and that some or all of its employees may be entitled to the benefits of the Fair Labor Standards Act." (R. 3.) It further alleged that the records requested were "relative, material and appropriate to determine whether * * * [petitioner] has violated * * * the Act and will aid in the enforcement of the provisions of the Act" (R. 6). In response to the order to show cause (R. 13–14), petitioner contended that its payroll and time records need not be produced because neither the industry in which it is engaged nor its employees are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act and petitioner "was not, therefore, required to operate in compliance therewith" (R. 24).

The district court, after finding that "this investigation * * * is for a lawfully author-

ized purpose, within the power of Congress to command, and the documents sought are relevant to the inquiry," issued an order requiring petitioner to comply with the subpoena (R. 34). The Court of Appeals affirmed, ruling that the Administrator has the right "to inquire concomitantly into these concomitant questions" of coverage and violations, and concluded that "in the absence of a clear showing of unreasonableness or gross abuse of the administrative function * * * the Courts will not obstruct or interfere with such an investigation merely in order to render an anticipatory judgment on the merits" (R. 43).

**ARGUMENT**

Petitioner presents no issue not already determined by this Court in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, and *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; see also *Fleming* v. *Montgomery Ward & Co.,* 114 F. 2d 384 (C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. A. 2), certiorari denied, 319 U. S. 761; *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C. A. 5), certiorari denied, 320 U. S. 752; *Walling* v. *Benson,* 137 F. 2d 501 (C. A. 8), certiorari denied, 320 U. S. 791; *Detweiler Bros.* v. *Walling,* 157 F. 2d 841 (C. A. 9), certiorari denied, 330 U. S. 819. These decisions approved judicial enforcement of subpoenas substantially identical to that here

involved, overruling substantially identical objections. Compare 327 U. S. at 210, n. 46, setting forth the text of one of the subpoenas then before this Court. See also *Graylyn Bainbridge Corporation* v. *Woods,* 173 F. 2d 790 (C. A. 8), certiorari denied June 27, 1949, holding that even in the absence of the explicit statutory investigative authority such as is conferred on the Administrator by the Fair Labor Standards Act, the Housing Expediter was authorized, pursuant to regulations issued under the Emergency Price Control Act of 1947, as amended (Pub. Law 464, 80th Cong., 2d Sess., Section 204 (d)) to conduct an investigation of a housing unit in a defense rental area without prior judicial determination that the housing unit was a "controlled" housing accommodation within the scope of regulations under the Housing and Rent Act of 1947.

Petitioner cites no judicial authority to the contrary but urges that such procedure "will open the door to abuses of serious consequence" if a judicial determination of coverage is not had at the preliminary investigative stage (Pet. 11). But the very point of this Court's decisions is that the administrative investigation of "violations" as well as of "coverage" may and should be completed without piecemeal litigation, and that the coverage issue in the first instance is properly left to the Administrator's determination—at least until the investigation has been completed.

## CONCLUSION

The decision of the court below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1949.

## APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 209, 211:

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Admin-

istrator shall bring all actions under section 17 to restrain violations of this Act.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1949